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Arizona Corporation Commission

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IN THE MATTER OF THE STAFF'S  
REQUEST FOR APPROVAL OF  
COMMERCIAL LINE SHARING  
AGREEMENT BETWEEN QWEST  
CORPORATION AND COVAD  
COMMUNICATIONS COMPANY

DOCKET NOS. T-03632A-04-0603  
T-01051B-04-0603

QWEST CORPORATION'S  
COMMENTS IN RESPONSE TO  
COMMISSION ORDER DENYING  
MOTION TO DISMISS AND QWEST  
CORPORATION'S MOTION FOR  
LEAVE TO FILE RESPONSE  
COMMENTS

Qwest Corporation ("Qwest") submits these comments in response to the Commission's Order denying Qwest's motion to dismiss, issued February 6, 2009. Through this filing, Qwest also seeks leave to submit response comments on April 27, 2009.

**I. Discussion**

In its Order denying Qwest's motion to dismiss, the Commission concluded that it did not have sufficient information to determine whether the commercial line sharing agreement (the "Arrangement Agreement") between Qwest and Covad Communications Company ("Covad") is an interconnection agreement that is subject to the Commission's review under Section 252(e)(1) of the Telecommunications Act of 1996 ("the Act"). Specifically, the Commission concluded that additional information is needed to determine whether Covad uses the high frequency portion of the loop only to provide information services and not telecommunications services. The Order thus states that "[w]e do believe, however, that Covad may possess important facts that would allow us to make the proper determination of the applicability of Section 252(e)(1),"

1 and it directs "Qwest and Covad to provide additional information that would allow us to  
2 determine our obligation to review the subject agreement."<sup>1</sup>

3 As the Commission's Order implies, Covad of course has the best knowledge of how it  
4 uses the line sharing element that it leases from Qwest, and Covad's comments in response to the  
5 Order are therefore important to the Commission's ultimate determination. With that in mind,  
6 Qwest hereby respectfully requests that it be permitted to submit comments in response to  
7 Covad's comments by April 27, 2009. As grounds for this request, Qwest observes that Covad's  
8 comments are likely to describe how Covad uses line sharing and to characterize that use as a  
9 telecommunications service. Qwest expects that there will be disagreement between the parties  
10 concerning whether Covad is providing an information service or a telecommunications service,  
11 and permitting response comments will permit a full discussion and more complete record with  
12 respect to that issue.

13 Turning to the merits, application of the FCC's rulings in the *Wireline Broadband Order*<sup>2</sup>  
14 demonstrates that there is little doubt Covad is using line sharing to provide an information  
15 service.<sup>3</sup> In the *Wireline Broadband Order*, the FCC ruled that DSL transmission service used  
16 for Internet access is an information service, not a telecommunications service.<sup>4</sup> Consistent with  
17 the FCC's rulings in that order, the Commission's Order in this case accurately recognizes that  
18 wireline broadband Internet access services and wireline broadband technologies used to provide  
19 Internet access services are "information services," not "telecommunications services."<sup>5</sup>

20 Line sharing is a wireline technology provided for the specific purpose of facilitating

21 <sup>1</sup> Order at ¶ 52.

22 <sup>2</sup> *In the Matter of Appropriate Framework for Broadband Access to Internet Order Wireless*  
23 *Facilities, et al.*, CC Docket No. 02-33, et al., FCC 05-150, Report and Order and Notice of  
24 Proposed Rulemaking (Sept. 25, 2005) ("*Wireline Broadband Order*").

25 <sup>3</sup> In submitting these comments, Qwest is not suggesting that it agrees with the Commission's  
26 determination that it may have jurisdiction over an agreement for line sharing. As Qwest has  
argued previously, line sharing is not within the network unbundling requirements of either  
Section 251 or Section 271 and is not subject to regulation by state commissions.

<sup>4</sup> *Wireline Broadband Order* at ¶¶ 12-19.

<sup>5</sup> Order at ¶ 45.

1 Internet access, and under the FCC's rules, it is therefore used for the purpose of providing an  
2 information service. As described by the FCC, line sharing requires ILECs "to share their  
3 telephone lines with competitive providers of high-speed Internet access, namely digital  
4 subscriber line (DSL) services."<sup>6</sup> The requirement for ILECs to provide line sharing was  
5 specifically designed to facilitate easier access to the Internet, as the FCC made clear when it  
6 stated that "[l]ine sharing eliminates the need for consumers to obtain a second phone line when  
7 they choose a company other than the incumbent LEC for high-speed access to the Internet."<sup>7</sup>  
8 Indeed, in its comments to the FCC, Covad itself emphasized that "allowing CLECs to buy...*line*  
9 *sharing* will enhance competition in the *Internet services market*...."<sup>8</sup> Because line sharing is  
10 specifically defined as the use of the high frequency portion of a loop to provide DSL service for  
11 Internet access purposes, under the *Wireline Broadband Order*, the service supported by line  
12 sharing is not a telecommunications service.<sup>9</sup>

13 Based on limited discovery it has conducted in this proceeding, Qwest anticipates three  
14 possible contentions from Covad in an attempt to classify the services it provides as  
15 telecommunications services. First, Covad may contend that wireline broadband access service  
16 is only an information service when a carrier is using its own facilities – not the facilities of  
17 another carrier – to provide the service. However, in the *Wireline Broadband Order*, the FCC

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19 <sup>6</sup> FCC Press Release, Docket Nos. CC 98-147, CC 96-98, 2001 FCC LEXIS 417 (Jan. 22,  
20 2001). See also *Newton's Telecom Dictionary* at 552 (24th Ed. 2008) (With line sharing "[a]  
21 DSL provider cuts a deal with an ILEC to run DSL service for Internet access purposes over the  
22 same local loop that the ILEC, or voice CLEC, uses for voice service.) (emphasis added).

23 <sup>7</sup> FCC Press Release, Docket Nos. CC 98-147, CC 96-98, 2001 FCC LEXIS 417 (Jan. 22,  
24 2001).

25 <sup>8</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications*  
26 *Capability*, FCC Docket No. 98-147, Comments of Covad Communications Company, at 37  
(Apr. 5, 2002) (emphasis added).

<sup>9</sup> The fact that line sharing is used for a service that is not a telecommunications service further  
confirms that line sharing is not covered by the 1996 Act. Under the Act, a "network element"  
(as distinguished from the "unbundled network elements" addressed in Section 251(c)(3)) is  
defined as "a facility or equipment used in the provision of a telecommunications service." 47  
C.F.R. § 51.5. Line sharing is not within this definition because it is not used to provide a  
telecommunications service.

1 was very clear in ruling that "[t]here is no reason to classify wireline broadband Internet access  
2 services differently depending on who owns the transmission facilities."<sup>10</sup> That is because, as the  
3 FCC explained, "[f]rom the end user's perspective, an information service is being offered  
4 regardless of whether a wireline broadband Internet access service provider self-provides the  
5 transmission component or provides the service over transmission facilities that it does not  
6 own."<sup>11</sup> Accordingly, the fact that Covad is providing broadband Internet access service over  
7 Qwest's leased facilities does not change the conclusion that the service is an information  
8 service.

9       Second, Covad is likely to contend that it uses line sharing to provide transmission  
10 service on a wholesale basis to Internet service providers ("ISPs") and that such a wholesale  
11 service is a telecommunications service. However, the *Wireline Broadband Order* establishes  
12 that whether a service is an information service or a telecommunications service must be  
13 determined from the perspective of the end user or the consumer. As the FCC explained in the  
14 quote set forth immediately above, the relevant inquiry is whether "[f]rom the end user's  
15 perspective, an information service is being offered . . . ." Thus, "what matters is the finished  
16 product made available through a service rather than the facilities used to provide it."<sup>12</sup> The FCC  
17 explained further that "[t]he end user of wireline broadband Internet access service receives an  
18 integrated package of transmission and information processing capabilities from the provider,  
19 and the identity of the owner of the transmission facilities does not affect the nature of the  
20 service to the end user."<sup>13</sup>

21       The controlling effect of the end-user's perspective for purposes of classifying a service is  
22 consistent with the FCC's order and the Supreme Court's decision in the *Brand X* proceeding.<sup>14</sup>

23 <sup>10</sup> *Wireline Broadband Order* at ¶ 16.

24 <sup>11</sup> *Id.*

25 <sup>12</sup> *Id.*

26 <sup>13</sup> *Id.*

<sup>14</sup> *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S.  
967 (2005); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other*

1 There, the Supreme Court noted that in the FCC's decision regarding the classification of cable  
2 modem service, the test employed was from the consumer's point of view. From the consumer's  
3 perspective, the FCC concluded, cable modem service is not a telecommunications service  
4 offering because the consumer uses the high-speed wire always in connection with the  
5 information-processing capabilities provided by Internet access, and because the transmission is  
6 a necessary component of Internet access:

7 As provided to the end user the telecommunications is part and parcel of cable  
8 modem service and is integral to its other capabilities. [Citations omitted.] The  
9 wire is used, in other words, to access the World Wide Web, newsgroups, and so  
forth, rather than "transparently" to transmit and receive ordinary-language  
messages without computer processing or storage of the message.<sup>15</sup>

10 Like a cable modem, the high speed spectrum of the loop is used to access the world wide web,  
11 newsgroups, and websites.

12 Accordingly, even if Covad uses line sharing to provide transmission service to ISPs on a  
13 wholesale basis, the issue for classification purposes is whether from the end-user's perspective,  
14 the service it ultimately receives is used for the information-processing capabilities provided by  
15 Internet access. Because ISPs are in the business of providing access to the Internet, there is no  
16 doubt that any service provided by an ISP that obtains transmission service from Covad is used  
17 in connection with the information-processing capabilities that the Internet provides.

18 Third, Covad is likely to claim that notwithstanding the FCC's ruling that wireline  
19 broadband access is an information service, the *Wireline Broadband Order* still permits it to  
20 offer broadband access as a telecommunications service on a common carrier basis. While the  
21 FCC does refer to providers offering wireline broadband access on a common carrier basis as a  
22 telecommunications service,<sup>16</sup> Covad has not submitted any evidence or information  
23 demonstrating that it is fulfilling all the duties of a common carrier and is truly providing a  
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25 Facilities, 17 FCC Rcd. 4798 (2002).

26 <sup>15</sup> *Brand X Internet Services*, 545 U.S. at 988.

<sup>16</sup> *Wireline Broadband Order* at ¶ 90.

1 common carriage service. For example, Covad has not pointed to tariffs containing common  
2 carriage services or, in the absence of tariffs, it has not demonstrated that it provides "an  
3 indifferent holding out" that is the essence of being a common carrier. Without such a showing,  
4 it must be determined that Covad's offerings are merely a collection of individualized  
5 agreements, not a common carriage service.<sup>17</sup> Indeed, this appears to be the case, since Covad  
6 treats the terms of its individual contractual agreements with ISPs as confidential.

7 Moreover, unlike a true common carrier service that is already in place and broadly  
8 available to the public, it appears that the transmission service Covad provides to ISPs is not  
9 already in place and is not a generally available offering. Instead, based on information and  
10 belief, Covad provides the service by leasing line sharing from Qwest when it receives individual  
11 requests from ISPs – in other words, it leases from Qwest each and every time one of its "private  
12 data network" customers seeks to extend their network to a particular end user. Further, in the  
13 *Wireline Broadband Order*, the FCC ruled that "a wireline broadband Internet access provider  
14 may not simultaneously offer the same type of broadband Internet access transmission on both a  
15 common carrier and non-common carrier basis."<sup>18</sup> Again, based on information and belief,  
16 Covad is providing its ISP customers with broadband Internet access on a non-common carrier  
17 basis and, accordingly, this ruling in the *Wireline Broadband Order* establishes that it cannot  
18 also be providing that service on a common carrier basis.

## 19 II. Conclusion

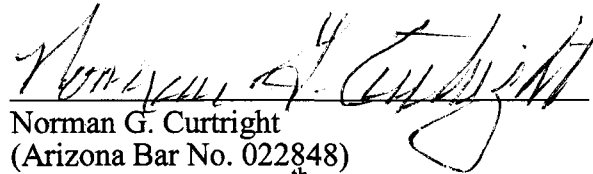
20 For these reasons, the Commission should determine that the Arrangements Agreement  
21 relates to an information service and is thus not subject to review by the Commission under  
22 Section 252(e)(1). Further, the Commission should permit the parties to submit response  
23 comments by April 27, 2009.

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25  
26 <sup>17</sup> *Id.* at ¶ 104.

<sup>18</sup> *Id.* at ¶ 95.

1 RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of April, 2009.

2 QWEST CORPORATION

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2 were filed this 13th day of April, 2009 with:

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